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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

VS.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Petition for a Writ Of Certiorari to the Supreme Court of Appeals of West Virginia

AMICUS CURIAE BRIEF OF CONTINENTAL CASUALTY COMPANY IN SUPPORT OF PETITIONER

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In re Agent Orange Product Liability Litigation,
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Other Authorities

Dennis Neil Jones, et al., Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process,
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Edward F. Sherman, Symposium on Problems in Disposition of Mass Related Cases and Proposals for Change,
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Eric Stallard & Kenneth Manton, Estimates and Projections of Asbestos-Related Mesothelioma and Exposures Among Manville Personal Injury Settlement Trust Claimants,
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John A. Maya, Punitive Damages and the Mass Tort: An Insurance Alternative to the Consequences of Multiple Liability,
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John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages,
72 Va. L. Rev. 139 (1986) 6, 8, 12, 17

Joseph M. Pastore III, The Uncertain Future of the Class Action Suit in School Asbestos Litigation,
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Note, Mass Liability and Punitive Damages Overkill,
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Note, Punitive Damages, the Common Question Class Action, and the Concept of Overkill,
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Richard A. Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37 (1983) 12

Samuel Issacharoff, Administering Damage Awards in Mass-Tort Litigation, 10 Rev. of Litig. 463 (1991) 7

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AMICUS CURIAE BRIEF OF CONTINENTAL CASUALTY COMPANY IN SUPPORT OF PETITIONER

AUTHORITY TO FILE *AMICUS CURIAE* BRIEF

The parties have consented to Continental Casualty Company filing this *amicus curiae* brief. The letters of consent are on file with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

Continental Casualty Company, a Chicago-based insurance company, is interested in the subject matter of this

petition because of the tremendous adverse effect that pending and future punitive damage awards could have on the company as a result of litigation nationwide against Continental's insureds. Continental is particularly concerned with litigation involving its insureds who manufactured asbestos products. Because punitive damages are, in some instances, passed on to insurers, Continental could ultimately be held liable for hundreds of millions of dollars of punitive damage awards in asbestos cases.

SUMMARY OF ARGUMENT

In *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court recognized that punitive damages are properly the subject of due process scrutiny. Yet since the Court issued that opinion, courts nationwide have concluded that in reality there are no limits to the discretion of juries and courts in awarding massive punitive damage awards bearing no reasonable relationship to the injury suffered by the plaintiff. The case currently before the Court well illustrates this state of affairs.

Amicus curiae Continental Casualty Company files this brief because any attempt to better define the due process standards appropriate to punitive damage awards must be formulated taking into account what is today perhaps the most troubling application of punitive damages — in mass tort litigation. Mass tort litigation involves injury to many individuals from a single act or course of conduct by the defendant. Products liability actions, such as asbestos-related litigation, are the most prevalent form of mass tort litigation, although it also includes various types of accidents (such as plane crashes) and environmental hazards.

Multiple awards of punitive damages in mass tort cases result in a defendant being punished over and over again for the same conduct. The result has aptly been described by jurists and commentators alike as "overkill," with widely shared agreement that such overkill violates the due process rights of defendants subjected to it. Not surprisingly, such overkill has rendered some

defendants insolvent and threatens numerous others with that fate, even though presumably no individual jury or court intended such a result. Perhaps more importantly, payment of punitive damage awards to plaintiffs who happen to sue earlier can prevent later payments of compensatory awards. Because such awards are rendered in different state and federal jurisdictions, no single appellate court, other than this Court, is in a position to review the reasonableness, or unreasonableness, of their aggregate effect.

The capricious effects of this phenomena are nowhere more apparent than in the nationwide mass tort litigation involving asbestos. With well over 100,000 claims already filed, and hundreds of thousands more such claims expected before the year 2050, the effects of the liability from compensatory damages alone has been formidable. When repeated awards of punitive damages, as much as several hundred million dollars in a single class action, are heaped on top of the compensatory awards, it is not surprising that more than a dozen asbestos manufacturers already have been driven into bankruptcy. Those that remain cannot possibly pay all valid compensatory claims as well as the huge multiple awards of punitive damages. As a result, many valid compensatory claims will go unpaid, while other claimants will walk away with massive windfalls from punitive awards. Moreover, the punitive and deterrent purpose of such awards is difficult to see when the manufacture of asbestos ceased long ago, and the only persons in fact punished are current employees and owners, as well as trade creditors and customers, who had nothing to do with the wrongful acts complained of.

Lower courts, although recognizing the due process concerns here, have felt themselves powerless to resolve them because they face litigation that is nationwide, with no single source of oversight, other than this Court. Any due process limitations imposed upon punitive damages by one jurisdiction can be, and are, ignored in others. Only this Court can meaningfully impose the necessary constitutional limitations on the lower courts, such as a requirement that a defendant not be

subjected to more than one punitive damages award for a single act or course of conduct.

In sum, Continental Casualty Company respectfully requests that the Court establish meaningful due process limitations on the award of punitive damages, and that in doing so it take into consideration the pervasive problems posed by the award of punitive damages in mass tort litigation.

ARGUMENT

I

THIS CASE ALONE ILLUSTRATES THE CONTINUING NEED FOR THIS COURT TO ENUNCIATE MEANINGFUL DUE PROCESS LIMITATIONS ON PUNITIVE DAMAGE AWARDS

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court expressed its concern with "punitive damages that 'run wild,'" and it recognized that substantive due process considerations under the Fourteenth Amendment required that "punitive damages [be] reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 111 S. Ct. at 1043, 1045. The Court thought it sufficient in *Haslip* that (1) the jury was told to take into account the character and degree of the wrong and the necessity of preventing a similar wrong, (2) the trial court reflected in the record the reasons for refusing to interfere with the jury verdict, and (3) the appellate court applied detailed substantive standards to ensure that the award did not exceed an amount that accomplished society's goals of punishment and deterrence. *Id.* at 1044-45. Although this Court affirmed the Alabama Supreme Court and upheld the punitive damages award in that case, the Court noted that the $840,000 punitive damages award, which was four times the amount of compensatory dam-

ages awarded, was "close to the line" in terms of its constitutional permissibility. *Id.* at 1046.

As the facts of the present case and the briefs of Petitioner and *Amici Curiae* make clear, *Haslip*'s minimal procedural guidelines failed to place meaningful substantive due process parameters upon punitive damages awards. As a result, the Court's opinion failed to stem the flow of outrageous and continually escalating punitive damages awards nationwide. The West Virginia Supreme Court of Appeals in this case, purportedly following the mandate set down in *Haslip*, appears to have had no qualms about affirming a punitive damage award that was 526 times the compensatory damages award. More importantly, as Petitioner and *Amici* have pointed out, this decision is not an aberration. Other courts, after reading this Court's opinion in *Haslip*, have permitted enormous punitive awards unanchored to the actual injury caused by the defendant, and with little or no due process oversight. Petition for a Writ of Certiorari at 13 & nn.10, 11; Brief of *Amici Curiae* American Petroleum Institute and National Association of Manufacturers in Support of Petition at 7-10.

For this reason alone, Continental joins with Petitioner and *Amici Curiae* supporting Petitioner in urging the Court to further define and refine due process limitations upon punitive damage awards. Continental urges this Court to provide the courts nationwide with due process standards that meaningfully control the present unfettered discretion exhibited by many of those courts in awarding, and affirming awards of, punitive damages.

II

THE LACK OF SIGNIFICANT DUE PROCESS RESTRICTIONS ON PUNITIVE DAMAGES IS PARTICULARLY DEVASTATING IN THE CONTEXT OF MASS TORT LITIGATION, WHERE PUNITIVE DAMAGES REPEATEDLY ARE AWARDED AGAINST THE SAME DEFENDANT FOR THE SAME CONDUCT

Punitive damage awards in an individual case, such as the case before the Court, frequently are deeply troubling because of their tendency to inflict severe, punitive harm to a defendant that is entirely out of proportion to the injury suffered by the plaintiff. The problems raised by such awards are magnified tremendously when the same defendant is independently assessed punitive damages awards in multiple proceedings for the very same conduct. This now commonly occurs in so-called "mass tort" litigation, where the same conduct results in injury to numerous individuals, who then sue the defendant, and recover awards, in separate fora. The result can be devastating to a defendant who is assessed punitive damages awards by each of these various courts intended to punish the same conduct. Such "[r]epetitive and unrestrained punitive liability for a single course of conduct threatens aggregate punishment that is, by any sensible standard, excessive and unfair." John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 140 (1986).

A. Mass Tort Litigation is Already Overwhelming Some Courts, and It Is a Phenomenon Here to Stay

Mass-tort litigation already is overwhelming some of the nation's courts. "The litany of well-known 'litigation events' arising out of common disasters, product uses, or environmental conditions — such as asbestos, Agent Orange, DES, Dalkon Shield, or skywalk collapses — attest to this phenomenon." Edward F. Sherman, *Symposium on Problems in Disposition of*

Mass Related Cases and Proposals for Change, 10 Rev. of Litig. 209, 209 (1991). Moreover, all indications are that mass tort litigation, although of recent origin, is here to stay. *Id.*[1]

Mass tort litigation, by its sheer magnitude, threatens to deprive the courts of their ability to carry out their intended function. As one scholar recently described the problem:

> Mass-tort litigation has placed the courts under siege. More so than any other single development, the courts' inability to counter the press of this litigation has forced a dramatic reevaluation of the judicial system's ability to "do justice" in any meaningful way.

Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 Rev. of Litig. 463, 463 (1991).

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[1] "Mass tort litigation will continue to preoccupy our legal system. Future technological development will produce not only new, unforeseen risks to public health and safety, but will also increase our ability to identify these dangers after they have caused injuries. Moreover, the experience of lawyers and judges in handling such cases increases the feasibility of future similar litigation and encourages successful plaintiffs' lawyers to identify and pursue claims arising from new areas of mass tortious behavior." Mark A. Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of Courts*, 54 Law & Contem. Probs. 227, 227-28 (1991).

B. Punitive Damages in the Mass Tort Context Result in "Overkill," in Violation of the Due Process Rights of Defendants

The "destructive synergism between traditional punitive damages doctrine and modern mass tort litigation" was first identified by the federal courts 25 years ago. *See Jeffries, supra*, at 141. In 1967, in the case of *Roginsky v. Richardson-Merrill, Inc.*, 378 F.2d 832 (2d Cir. 1967), the Second Circuit faced one of many requests nationwide for punitive damages in cases involving MER/29, a drug designed to lower blood cholesterol but which, as a side effect, caused cataracts. Although ultimately finding no grounds for punitive damages, Judge Friendly, writing for the court, grappled with due process concerns with awarding such damages in more than one case against the same defendant:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount here awarded, these would run in to tens of millions, as contrasted with the maximum criminal penalty of "imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine."... We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.

Id. at 839.

Although a number of courts and commentators have struggled with this problem since, *see infra* at 11-13, the current helplessness of lower courts facing this issue is best illustrated by *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989) (*Juzwin I*), and by the court's subsequent opinion vacating its

earlier order, 718 F. Supp. 1233 (D.N.J. 1989) (*Juzwin II*). In *Juzwin I*, a consolidated asbestos-related product liability action, the court, noting the serious problems inherent in the imposition of punitive damages in mass tort litigation, concluded that awarding punitive damages more than once in such a context violated the defendants' due process rights. 705 F. Supp. at 1064

The imposition of punitive damages in the mass tort context, noted the court, magnifies to an extreme degree all of the normal problems inherent in the usual punitive damages case. *Id.* at 1055. These include (1) vague jury standards and excessive jury discretion, (2) imposition of a penalty in a civil matter that may far exceed any penalty provided under criminal statutes, with none of the same safeguards, (3) the possibility of insolvency as a result of such awards, and (4) payment of such penalties to a fortuitous plaintiff rather than to a public treasury. *Id.* As Judge Sarokin explained:

> All of the foregoing defects are exacerbated in mass tort litigation. Defendants can be held liable over and over again for the same conduct, a result which would be barred by virtue of the right against double jeopardy in a criminal matter. Although an award in an individual case may be fair and reasonable, the cumulative effect of such awards may not be. Nor is the cumulative effect of such awards reviewable by a single court, since the matters are permitted to proceed and be reviewed separately and independently.

Id.

Such multiple punitive damage awards result in, and continue to threaten, injustice, in many cases on a massive scale. Probably the most commonly recognized problem is that the payment of punitive damages to those who happened to sue earlier can diminish the ability of the defendant even to pay

compensatory damages to later deserving claimants. As Judge Sarokin explained, "If there is a limited fund, priority should be given to compensating those who have been injured rather than conferring windfalls on those who have already been compensated." *Id.* *See* William W. Schwarzer, *Punishment Ad Absurdum*, Cal. Lawyer 116 (Oct. 1991) ("In mass tort cases such as those involving asbestos, the available assets of the defendants may be depleted long before all plaintiffs are compensated. To permit the first plaintiffs to receive punitive damages when later plaintiffs have yet to come to trial seems foolish and unfair.").

In addition, multiple awards of punitive damages can have the punitive effect of driving businesses into bankruptcy — the corporate equivalent of a death sentence — even though no single court or jury intended or desired that result. John A. Maya, *Punitive Damages and the Mass Tort: An Insurance Alternative to the Consequences of Multiple Liability*, 42 Syracuse L. Rev. 1241, 1253 (1991) ("Punishment, and not annihilation, is the object [of punitive damages].") (quoting *Pease v. Beech Aircraft Corp.*, 113 Cal. Rptr. 416 (Ct. App. 1974) (order granting new trial, Civ. No. 162581 (1971)); *Juzwin I*, 705 F. Supp. at 1055 ("the ability to financially destroy an individual, a business, or an entire industry ... is an awesome power to place in the hands of a jury without limitations or guidelines"). Moreover, the deterrent purpose of punitive damages is lost where the conduct complained of occurred decades earlier and results merely in the punishment of owners or corporate officials who did not participate in that conduct. Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 12 Cardozo L. Rev. 1819, 1864 (1992). And if successive fines render a company insolvent, the imposition of punitive damages punishes innocent employees and trade creditors rather than the persons who committed the misconduct.

In light of these intractable problems, Judge Sarokin issued an order stating that the court would dismiss plaintiffs' claims for punitive damages against those defendants "who are able to present competent proof that liability for punitive damages has already been imposed upon them for the conduct

alleged to be the basis of a punitive damage claim in this action." *Id.* at 1065.

Numerous jurists have agreed with Judge Sarokin's reasoning in finding that punitive damages awarded in the mass tort context threaten the defendants' due process rights under the Fourteenth Amendment. *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.) (finding strong arguments why "the courts [should] shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts"), *cert. denied*, 479 U.S. 852 (1986); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process."); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967); *In re Agent Orange Product Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("In theory, ...when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit either as a matter of policy or as a matter of due process to the amount of times defendants may be punished for a single transaction."); *In re Northern Dist. Cal. Dalkon Shield IUD Products Liab. Litig.*, 526 F. Supp. 887, 900 (N.D. Cal. 1981) ("Common sense dictates that a defendant should not be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs."), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). *But see Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985) (finding no *procedural* due process problem because "the presence of a judicial tribunal before which to litigate the propriety of a punitive damages award provides Johns-Manville with all of the procedural safeguards to which it is due"), *cert. denied*, 478 U.S.

1021 (1986); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 281-87 (D.N.J. 1989) (finding merit in "overkill" argument but no evidence that defendants in case faced bankruptcy).

Similarly, commentators almost uniformly have agreed that multiple awards of punitive damages for the same conduct create or threaten serious injustice. *See, e.g.*, John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 154 (1986) ("Limiting aggregate punitive awards is a straightforward application of an ancient and settled principle of Anglo-American justice. That principle condemns excessive monetary penalties, whether civil or criminal. More specifically, it requires, at a minimum, that monetary penalties be limited in amount so as not to threaten the defendant's economic viability.");[2] Dennis Neil Jones, *et al.*, *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 Ala. L. Rev. 1, 3 (1991) ("[A]t some point the aggregate amount of multiple punitive damages becomes fundamentally unfair, in violation of the Due Process Clause. The aggregate effect of such awards may reach far beyond their purpose to punish and

[2] Part of the rationale in *Haslip* for affording the jury considerable discretion in awarding punitive damages there does not apply when mass tort litigation is involved. In *Haslip* the Court stated: "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." 111 S. Ct. at 1043 (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988)); *see also* 111 S. Ct. at 1046 (Scalia, J., concurring in the judgment). Although, as Professor Jeffries explains, the argument for *containing* excessive punitive damage awards has been around for a long time, he points out that awards of punitive damages in mass tort cases are very new, and hence do not deserve the presumption of validity associated with longevity. Jeffries, *supra* at 140 ("the application of traditional punitive damages doctrine to modern mass tort litigation has produced a situation altogether different from past experience.").

deter, becoming what has been coined 'overkill.'"); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983) ("The recent unprecedented number of multiple punitive damages verdicts in mass tort cases has raised again the spectre of overkill recognized by Judge Friendly in *Roginsky*.") Note, *Punitive Damages, the Common Question Class Action, and the Concept of Overkill*, 13 Pac. L.J. 1273 (1982); Note, *Mass Liability and Punitive Damages Overkill*, 30 Hastings L.J. 1797 (1979).

C. The Asbestos Cases Best Illustrate the Current and Potential Future Dimensions of the Problem

Nowhere are the problems caused by multiple awards of punitive damages more acute now than in the lawsuits, such as the *Juzwin* case itself, arising out of asbestos-related bodily injury and property damage. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1335 (5th Cir. 1985) (Clark, C.J., dissenting) ("No other category of tort litigation has ever approached, either qualitatively or quantitatively, the magnitude of the claims premised on asbestos exposure.").[3] Cases grappling with claims

[3] "No litigation in American history has involved as many individual claimants, been predicated upon the severity of injury, consumed as many judicial resources, resulted in as much compensation to claimants, compelled the number of defendants' bankruptcies, or been as lucrative to lawyers as asbestos litigation. Asbestos litigation has been referred to as an 'impending disaster' — a crisis situation. Even though 100,000 claims have already been resolved, 100,000 new claimants now seek compensation. For each claim resolved, two to three new claims are being filed. More than a dozen major defendant companies have been driven into bankruptcy, thereby reducing the size of the asset pool available to compensate the severely injured. The seeming unending growth in the number and valuations of claims

(continued...)

for asbestos-related bodily injury and property damage showcase and highlight the fundamental problems that arise when courts and juries are permitted repeatedly to heap punitive damage awards on top of already large compensatory damage awards.

As the Court undoubtedly is well aware, the number of asbestos claims is huge and ever growing. According to one scholar, "[o]ver 150,000 asbestos-related claims were filed by 1991, and it is estimated that 2,000 new cases are filed each month." Joseph M. Pastore III, *The Uncertain Future of the Class Action Suit in School Asbestos Litigation*, 8 Pace Env. L. Rev. 667, 667 (1991). In a recent report by Eric Stallard and Kenneth Manton for the Duke University Center for Demographic Studies entitled *Estimates and Projections of Asbestos-Related Mesothelioma and Exposures Among Manville Personal Injury Settlement Trust Claimants*, 1990-2049 42 (Draft November 30, 1992), the authors estimate that between 1990 and 2049 there will be 560,301 asbestos-related claims. These numbers already overwhelm the nation's state and federal courts and will continue to do so well into the 21st Century. *See* Linda S. Mullenix, *Problems in Complex Litigation*, 10 Rev. of Litig. 213, 214 (1991) ("Asbestos litigation has become the federal court system's Sisyphean task: no matter how efficiently the courts push asbestos lawsuits through the system, more cases are filed in the courts without signs of respite."); *accord* Brickman, *supra*, *passim* (describing how every attempt by courts to reduce the asbestos backlog has in fact made it easier for plaintiffs' attorneys to file even more asbestos claims).

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[3](...continued)
that courts and juries are producing will inexorably lead to additional defendants' bankruptcies. Those who peer into the future see an estimated cost to defendants ranging from thirteen to thirty billion dollars — valuations wholly inconsistent with the continued solvency of most currently named defendants." Brickman, *supra*, at 1819-20.

The wrongful conduct at issue in punitive damages claims against asbestos manufacturers occurred roughly between 1930 and 1960, when it is alleged that *some* asbestos manufacturers tried to suppress the dangerous character of asbestos fibers. *See* Paul Brodeur, *Outrageous Misconduct, The Asbestos Industry on Trial* (1985). Indeed, asbestos was taken off the market in 1971. *Id.* The punitive damage awards, however, are being, and apparently will continue to be, assessed from now on through the year 2049. Stallard & Manton, *supra*, at 42. This means that corporate defendants already are being "punished" — again and again — for conduct that occurred 30 to 60 years ago. Before the claims terminate, punitive damage awards will be meted out for conduct that is over a *century* old, when no one will be alive who had anything to do with the relevant decisions.

The combination of compensatory and punitive damages already has led to bankruptcy proceedings for at least 15 asbestos manufacturers. Brickman, *supra*, at 1819 & n.2. The increasing imposition of punitive damages thus hurts two classes of innocent parties. First, they wipe out funds that otherwise would be available to pay compensatory damages to deserving plaintiffs in the future. Brickman, *supra*, at 1867; *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1330 (5th Cir. 1985) (Clark, C.J., dissenting). Second, punitive damages punish current corporate owners and officials, as well as employees, customers and trade creditors, who took no part in, and had absolutely no knowledge of, the wrongdoing.

History shows that the punitive damages awarded in a single case can be enormous. Already hundreds of millions of dollars have been awarded in punitive damages against asbestos defendants. Brickman, *supra*, at 1867-68 & n.198. In one case alone, *Cimino v. Raymark Industries*, 751 F. Supp. 649 (E.D. Tex. 1990), for instance, where the court consolidated 2300 claims for one "trial" in the Eastern District of Texas, the court imposed punitive damages across the board using a multiplier for each defendant that levied punitive damages by an amount that was 1.5 to 3 times the compensatory damages for each defendant. The average compensatory award to individual plaintiffs in that

case exceeded $500,000. As a result, the resulting punitive damages award alone was several hundred million dollars.

D. Lower Courts Are Powerless to Solve the Problem

Six months after publishing his opinion in *Juzwin I*, Judge Sarokin, on a motion for reconsideration, issued a second opinion (*Juzwin II*) vacating the first. 718 F. Supp. 1233. In that opinion he refused to back down from his conclusion that multiple awards of punitive damages in the mass tort context were an unconstitutional violation of due process. *Id.* at 1236. He concluded, however, that "[u]ntil there is uniformity either *through Supreme Court decision* or national legislation, this court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated." *Id.* at 1235 (emphasis added). In the end, the court vacated its previous order because, although it had identified a clear constitutional wrong, it felt itself powerless to provide a meaningful remedy. The court's jurisdiction was limited by the borders of New Jersey, and it had no way to ensure that the parties' due process rights were protected in every court they entered. Hence, Judge Sarokin could not be sure what amount of punitive damages, if any, was appropriate in his court. *Id.*

Courts, including the *Juzwin* court, have recognized several other possible solutions to the problems posed by punitive damage awards in mass tort cases besides the solution proposed, and ultimately rejected, by Judge Sarokin. However, each such "solution" has been deemed unattractive for one reason or another.

One possibility is to inform the jury of the number of times a party already has been held liable for punitive damages. But this "requires a defendant to advise the jury that prior juries hearing the same evidence have already found that the defendant's conduct was so egregious as to warrant punitive damage awards." *Juzwin*, 705 F. Supp. at 1056. This has uniformly been deemed an undesirable option for a rational

defendant, who risks the likelihood that a jury will simply consider such evidence additional proof that punitive damages are appropriate. *Id.* *See* Jeffries, *supra*, at 146 ("this supposed protection for the defendant would obviously 'backfire' if, as seems inevitable, the jury takes a history of prior awards as evidence of liability in the instant case").

Another alternative would be for trial courts to monitor awards and, after accepting evidence of prior penalties in other forums, appropriately reduce the award. But as the *Juzwin* court pointed out, "the parochial concerns of the courts of the various states and the vague guidelines for justifying a judicial determination of 'excessiveness' of awards ... render this remedy an ineffectual alternative." *Id.* at 1056 n.1. As Professor Jeffries elaborates:

> The court that denies an additional award on the ground that the defendant has been sufficiently punished by previous judgments has no guarantee that other courts will follow suit.... [T]he most that an individual state can do is to adopt a self-denying ordinance that would succeed only in disadvantaging its own citizens relative to claimants in less responsible jurisdictions. The likelihood would be just the opposite — that a kind of competition will develop to show that Texas plaintiffs (and their lawyers) are just as entitled to riches as their California counterparts.

Jeffries, *supra*, at 146; *accord* Brickman, *supra*, at 1827 ("In the highly mobile asbestos-claims market, the efforts of one jurist to undo the perverse incentive structure is easily countered by other jurists not similarly inclined.")

Judge Jack Weinstein was successful in using a mandatory class action to solve this problem for the claims

arising out of Agent Orange, *In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983); however this solution was never challenged on appeal, as the parties settled, *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 167 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). Appellate courts have rejected such class action devices in suits involving IUDs, *In re Northern Dist. Cal. Dalkon Shield IUD Products Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983), and the collapse of the Marriot skywalk in Kansas City, *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982). Such a class action for asbestos cases was expressly found to be unworkable in *In re School Asbestos Litigation*, 789 F.2d 996, 1005-07 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986), primarily because the filing of new asbestos claims is forecast to continue for years into the future, and any such class would therefore necessarily be under-inclusive. *See also Juzwin I*, 705 F. Supp. at 1063 (noting that class action device not available in asbestos cases).

E. Due Process Requires that a Defendant Face No More than One Punitive Damage Award for a Single Act or Course of Conduct

Faced with the inherent limitations of his geographic jurisdiction, Judge Sarokin in *Juzwin II* recommended that this Court adopt the following national standards for dealing with punitive damages claims generally:

> 1. A full and complete hearing must be held, after adequate time has elapsed to investigate and discover the full scope and consequences of such conduct and during which all relevant evidence is presented regarding the conduct of the defendant against whom the claim is made;

> 2. Adequate representation is afforded to the plaintiff, with an opportunity for plaintiffs similarly situated and their counsel to cooperate and contribute towards the presentation of the punitive damages claim, including presentation of the past and probable future consequences of the defendant's wrongful conduct.
>
> 3. An appropriate instruction to the jury that their award will be the one and only award of punitive damages to be rendered against the company for its wrongful conduct;
>
> 4. Such other conditions as will assure a full, fair and complete presentation of all the relevant evidence in support of and in opposition to the claim.

718 F. Supp. at 1235.

While recognizing that the case before the Court does not involve mass tort litigation, Continental Casualty Company nevertheless believes that Judge Sarokin's proposed guidelines are useful for this Court to bear in mind when deciding general due process parameters for punitive damage awards. Although many punitive damages claims arise outside the mass tort context, the Court in formulating general due process guidelines for punitive damage awards must do so fully cognizant of their potential effect upon that body of cases where punitive damages raise the most urgent due process concerns. At a minimum, this Court should make clear that it violates a defendant's fundamental due process rights to be assessed punitive damages more than once for the same act or course of conduct. Without this minimal level of protection, courts and juries will continue to hand down an increasing number of punitive damage awards that unfairly strike their target for the second, tenth or ten thousandth time.

CONCLUSION

The decision of the West Virginia Supreme Court of Appeals should be reversed.

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